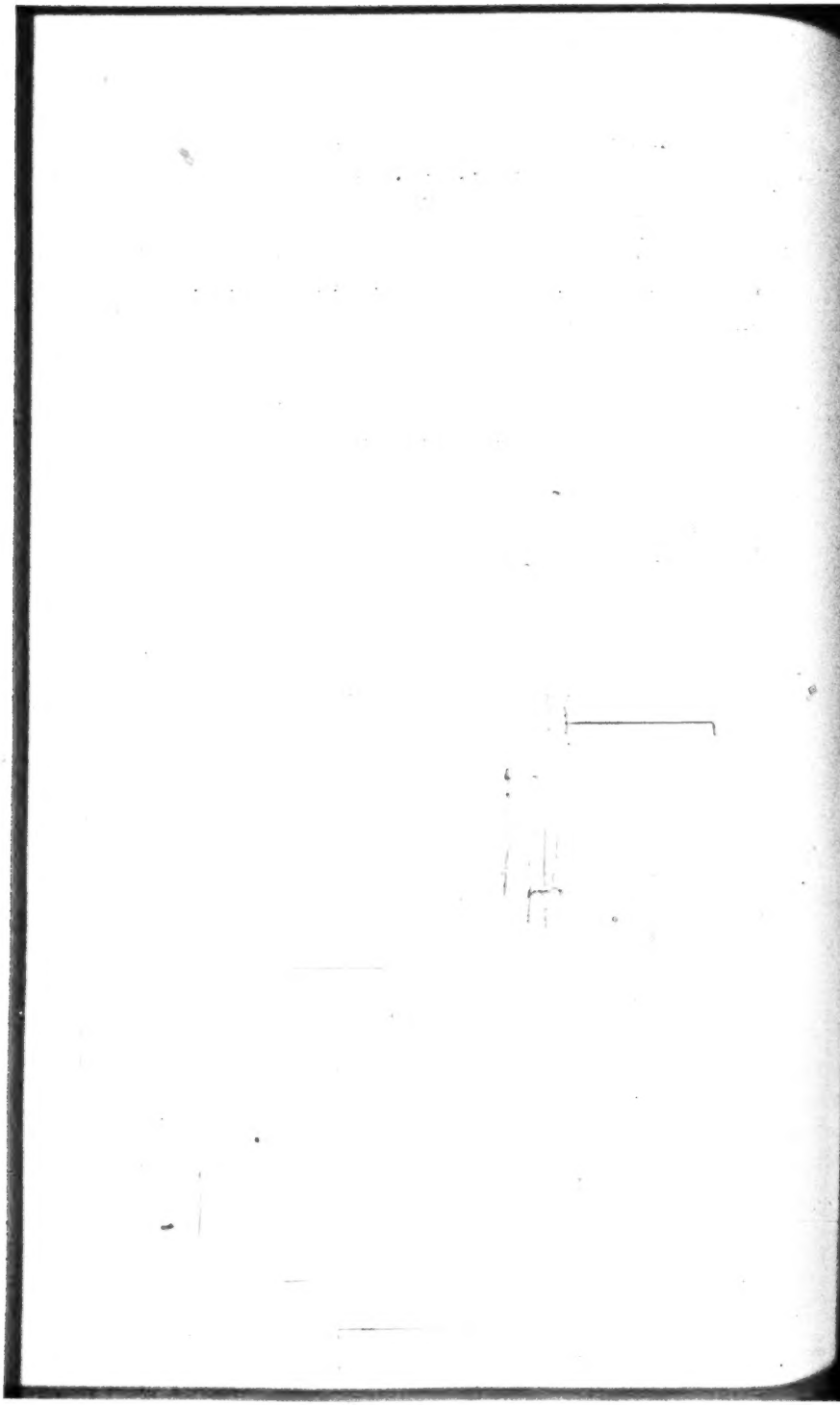

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569-955—75——1

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1689

UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN BUILDING MAINTENANCE INDUSTRIES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The findings and conclusions of the district court (App. 211-215) are unreported.

JURISDICTION

The judgment of the district court (App. 209) was entered on December 12, 1973. A notice of appeal to this Court was filed on February 7, 1974, and probable jurisdiction was noted (App. 216) on January 13, 1975. The jurisdiction of this court is conferred by Section 2 of the Expediting Act, 15 U.S.C. 29. *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526.

QUESTION PRESENTED

Whether a corporation that performs janitorial and maintenance services within a single state for companies selling products in interstate and foreign commerce, that solicits and negotiates such contracts through interstate communications, and that purchases substantial quantities of supplies originating in other states, is "engaged in commerce" for purposes of Section 7 of the Clayton Act.

STATUTES INVOLVED

Section 1 of the Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 12, provides in pertinent part:

> "Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided,* That nothing in this Act contained shall apply to the Philippine Islands.

Section 7 of the Clayton Act, 389 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any

part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

The United States instituted this civil antitrust suit against American Building Maintenance Industries (American Building) on January 8, 1971, contending that American Building violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, by acquiring the stock of J. E. Benton Management Corp. and by merging Benton Maintenance Company into American Building Maintenance Company of California, a wholly owned subsidiary of American Building. The complaint alleged that the merger and acquisition, which were consumated in 1970, may substantially lessen competition in the sale of janitorial services in Southern California and the Los Angeles area. (App. 8)[1] On December 12, 1973, the district court granted the defendant's motion for summary judgment, holding that neither of the Benton companies was "engaged in commerce" within the meaning of Section 7 of the Clayton Act at the time of the merger and acquisition (App. 214).

[1] The complaint defines "Southern California" as Santa Barbara, Ventura, Los Angeles, Orange, San Bernardino and Riverside Counties (App. 6).

A. THE ACQUIRING COMPANY AND THE INDUSTRY

American Building Maintenance Company of California is a wholly owned subsidiary of American Building. The complaint alleged that American Building is the largest seller of janitorial services in Southern California and one of the largest sellers of such services in the country. At the time the complaint was filed, American Building had 56 janitorial service branches serving 500 communities in the United States and Canada. American Building's national revenues from janitorial services were approximately $52.4 million in 1969. In Southern California, American Building's janitorial service revenues for 1969 were $10.9 million—roughly 10 percent of the market (App. 7).

Service industries are the fastest growing segment of the American economy. More than half of the nation's work force is employed in those industries and soon more than half of this country's Gross National Product will be generated in the service sector. The supplying of janitorial services by independent contractors is one of the fastest growing service businesses. Receipts for such services increased by 324 percent from 1958 to 1967. In 1972, national receipts for commercial, institutional and industrial cleaning services were more than $1 billion (App. 129–133, 137).

There is a nationwide trend toward concentration in the janitorial service industry. The four largest firms made at least 170 acquisitions of janitorial service and related businesses between 1961 and 1973.

American Building made 54 of those acquisitions, which included five janitorial service companies in the Los Angeles area in addition to the Benton companies (App. 140–143).

American Building has publicly acknowledged that it intends to accelerate this acquisition program. In a December 1971 speech to institutional investors, the president of American Building stated: "We have been buying four—six companies a year. I would say in the future it would be fair to estimate that we will buy between six and eight companies a year" (App. 142).

B. THE ACQUIRED COMPANIES

Jess E. Benton, Jr. owned all of the stock of J. E. Benton Management Corp. and 85 percent of the stock of Benton Maintenance Company at the time of the merger and acquisition (App. 49, 139). Both companies sold janitorial services; Benton Management also provided building management services and engaged in the real estate business. All of the facilities served by these companies were located in Southern California. The complaint alleged that the Benton Companies ("Benton") was the fourth largest seller of janitorial services in Southern California, with 1969 sales of over $7.2 million. This represented about 7 percent of the total janitorial service sales in that area (App. 7).

C. BENTON'S OPERATIONS

Benton provided janitorial services necessary to support the interstate operations of its customers (App. 133–137). These customers included TRW,

Inc., NASA Jet Propulsion Laboratory, Rockwell International Corp., General Telephone Co., of California, Pacific Telephone and Telegraph Co., Mobile Oil Corp., Union Oil Co., Texaco, Inc., Carnation Co., Teledyne, Inc., and Tishman Realty & Construction Co. (App. 52).

For its aerospace customers, Benton maintained and cleaned offices, manufacturing areas and laboratories. Certain areas required exceptionally high maintenance quality—*e.g.*, "clean rooms" utilized for spacecraft fabrication and assembly, and rooms housing electronic data processing equipment. In these areas, janitorial maintenance was an integral part of production operations.[2]

Benton maintained and cleaned offices and rooms containing switching equipment for its telephone company clients, corporate headquarters buildings for Union Oil, Carnation and Teledyne, and regional headquarters buildings for Mobil and Texaco. Benton performed all the janitorial services for the owner and tenants at Tishman Plaza, a large office complex in the Los Angeles area.[3]

In some cases Benton's activities were confined to cleaning services. It assumed responsibility, in other cases, for maintaining heating, air conditioning, electrical and plumbing facilities (App. 71–90). Benton paid utility bills for Texaco (App. 84).

Although all of Benton's maintenance contracts were performed in California, some of the contracts

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[2] App. 54–70. Cf. App. 179–181.

[3] App. 71–90.

were negotiated with out-of-state owners through the use of interstate communications facilities. The Tishman Plaza contract was executed by Tishman executives based in New York (App. 72), and the New York Life Insurance contract was the product of interstate negotiations (App. 147–160). Those two contracts made a significant contribution to Benton's total revenues.[4]

Benton regularly utilized interstate communications in its business. Between January 1, 1969, and June 30, 1970, Benton was shown to have mailed almost 200 letters across state lines to customers, potential customers, suppliers, government agencies, etc. It also utilized interstate telephone and telegraph facilities (App. 146–161).

Benton purchased substantial quantities of janitorial supplies and other goods manufactured outside of California. In 1969 Benton purchased more than $120,000 in janitorial supplies which were manufactured outside California,[5] and paid about $36,000 in lease fees attributable to vehicles and a computer which were manufactured in other states (App. 145).[6]

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[4] The details of these transactions are contained in exhibits covered by the district court's protective order of June 2, 1971.

[5] The district court findings focused only on Benton's direct interstate purchases which were admittedly small. The court found direct purchases aggregating approximately $140 and interstate telephone calls of $19.78 (Finding 7, App. 212; Finding 15, App. 213). The findings do not reflect Benton's purchases of out-of-state products from local distributors, which, as noted in the text, were substantial.

[6] Benton also expended about $80,000 in funds advanced by clients for gas, water, electricity and elevator parts which originated outside of California (App. 145, 184–185).

D. THE SUMMARY JUDGMENT PROCEEDINGS

American Building filed a motion for summary judgment together with proposed findings of fact and conclusions of law. After receiving memoranda, affidavits and counter-affidavits from both parties and hearing oral argument, the district judge adopted, with minor modifications, the findings and conclusions submitted by American Building. The court did not expand its findings to reflect evidentiary material submitted after American Building prepared its original proposed findings.[7]

The court found that the Benton companies conducted their businesses entirely within California, and that Benton did not advertise nationally. Benton's purchases of products "which were shipped to it from outside California" and its expenditures for interstate telephone calls, the court concluded, were *de minimus* (App. 212.). The court held that each Benton company "was not a corporation engaged in commerce" and that "[t]here is no jurisdiction of the Federal Court in this action under Section 7 of the Clayton Act (15 U.S.C. § 18)" (App. 214).

[7] American Building submitted its proposed findings on August 28, 1973 in conjunction with the filing of its motion for summary judgment of dismissal (App. 4). The government submitted extensive evidentiary material in the form of affidavits of customers, suppliers, competitors and experts on October 15, 1973 (App. 4). The district court adopted, almost verbatim, American Building's proposed findings (App. 211-215). Since those findings do not reflect the material contained in the affidavits submitted by the government concerning the Benton companies' activities—the accuracy of which is not seriously disputed—the court's findings are clearly deficient.

SUMMARY OF ARGUMENT

The question presented by this case is whether the words "engaged in commerce" as used in Section 7 of the Clayton Act encompass firms engaged in intrastate activities that substantially affect commerce. This question was presented but not resolved in *Gulf Oil Corp.* v. *Copp Paving Co., Inc.* No. 73–1012, decided December 17, 1974. We adhere to the view set forth in our brief *amicus curiae* in *Gulf Oil, supra,* that "engaged in commerce" for purposes of Section 7 means all commerce subject to federal jurisdiction under the commerce power.

1. A broad construction of the commerce requirement of Section 7 is consistent with the history and purpose of the Clayton Act. That Act was a remedial statute designed to correct deficiencies in the Sherman Act. The Sherman Act has been construed to cover local activities that substantially affect interstate commerce (*United States* v. *South-Eastern Underwriters Assn.,* 322 U.S. 533), and it would be anomalous to interpret the Clayton Act—a statute intended to supplement the Sherman Act—more restrictively.

2. The language and legislative history of the Clayton Act necessitate a broad construction of Section 7's commerce requirement. See pp. 18–23, *infra.* The definition of "commerce" contained in Section 1 of the Clayton Act and its accompanying legislative history show that Congress intended to claim broader commerce coverage than that provided in the Sher-

man Act. Although the Congressional debates on the Clayton bill do not reveal a consensus concerning the precise scope of the commerce power, the debates do show that a majority did not believe that federal jurisdiction was limited to activities in the "flow of commerce". That view was supported by contemporaneous judicial decisions. Equally importantly, the legislative history confirms that Congress intended to claim the full sweep of its power to regulate commerce.

3. This Court's decisions regarding the commerce requirements of the Robinson-Patman Act (*Gulf Oil Corp.* v. *Copp Paving Co., Inc., supra,* slip op. at 6–12) and the Federal Trade Commission Act (*Federal Trade Commission* v. *Bunte Bros.,* 312 U.S. 349) are not controlling here.

The terms of Section 2(a) of the Robinson-Patman Act are more restrictive than the language of Section 7 and the courts have consistently construed Section 2(a) to require a sale crossing a state line. Moreover, in enacting the Robinson-Patman Act, Congress expressly rejected proposed language that would have provided broader commerce coverage. This Court's decision in *Bunte Bros.,* construing the Federal Trade Commission Act, is based on factors which are not relevant to Section 7 and in part upon the unfounded assumption that Congress always includes words such as "affecting commerce" when it wishes to regulate intrastate commerce which affects interstate commerce. Congress did not follow that style

of draftsmanship in 1914. It had no reason to do so because the contemporaneous judicial decisions defined "commerce among the States" to include all commerce except commerce which is confined within one state *and* does not affect other states.

4. Thus, the language, history and purpose of the statute demonstrate that "engaged in commerce" means engaged in activities subject to the Commerce Power. Activities which affect the flow of commerce are subject to the Commerce Power and Benton engaged in such activities. It purchased and leased substantial quantities of goods which originated outside California. Such purchases have frequently been recognized in Sherman Act cases as sufficient to establish the requisite effect upon interstate commerce. Benton also affected commerce by providing essential services to several of the country's leading interstate enterprises. Therefore, the Benton companies were "engaged in commerce" for purposes of Section 7.

Even if "engaged in commerce" were equated with being in the "flow of commerce", Benton's activities satisfy that test. Benton provided services to numerous clients engaged in interstate and foreign commerce and those services were essential to its clients' interstate operations. Indeed, those interstate enterprises "contracted out" essential operations to Benton.

ARGUMENT

I. SECTION 7 APPLIES TO FIRMS ENGAGED IN LOCAL ACTIVITIES THAT SUBSTANTIALLY AFFECT COMMERCE

A. INTRODUCTION

The district court erred in concluding that the Benton companies were not "engaged in commerce" at the time of their respective merger with, and acquisition by, American Building. Although the court did not fully explain its understanding of the words "engaged in commerce", it adopted a restrictive construction that is contrary to both the history and purpose of Section 7 of the Clayton Act.

This Court has never determined the meaning of "engaged in commerce" for purposes of Section 7. This question was presented in *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, No. 73–1012, decided December 17, 1974, and while it was discussed in the Court's opinion (see slip op. 14–17), the Court ultimately determined that it need not resolve the issue since the record contained "no evidence of effect on interstate commerce" (*id.* at 16). Thus, Mr. Justice Powell's opinion for the Court concluded, "* * * the 'effects on commerce' theory, even if legally correct, must fail for want of proof" (*id.* at 16–17).

The record in this case establishes that the Benton companies were engaged in activities that "affect" interstate commerce. See pp. 36–44, *infra*. The question of the proper construction of "engaged in commerce" for purposes of Section 7 of the Clayton Act—which this Court did not resolve in *Gulf Oil Corp.* v.

p Paving Co., Inc., supra—is therefore presented

e adhere to our submission presented in our brief
us curiae in *Gulf Oil Corp.* v. *Copp Paving Co.,*
supra, that in enacting the Clayton Act, Congress
ht to claim the full sweep of its power to regu-
commerce. Accordingly, the commerce require-
t of the Clayton Act should be construed, like that
ne Sherman Act (*United States* v. *South-Eastern*
erwriters Assn., 322 U.S. 533), to reach all activ-
that affect interstate commerce.

Gulf Oil Corp. v. *Copp Paving Co., Inc., supra,*
Court commented that the "in commerce" lan-
ge of Sections 3 and 7 of the Clayton Act and
ion 2(a) of the Robinson-Patman Act "appears to
te only persons or activities within the flow of
state commece * * *" (slip op. 8). But we submit
it should not be assumed that the words "in
nerce" have a uniform meaning that can be
ied without regard to the historical and linguistic
ext in which they have been used.

ords normally do not have a single plain meaning
can be applied in every circumstance, and this is
icularly true in the case of words such as "com-
ce," "in commerce," "interstate commerce," etc.
words have been used in different statutes at
rent times to describe different combinations of
ities and transactions. They may not even have
isely the same meaning in different provisions of
same statute. See *Atlantic Cleaners & Dyers* v.
ed States, 286 U.S. 427, 433–434.

In *Kirschbaum Co.* v. *Walling,* 316 U.S. 517, this Court observed (*id.* at 520–521):

> The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of regulation, the specific terms in which the new regulatory legislation has been cast, and the procedures established for its administration.

As we shall now show, our submission regarding the proper construction of the words "engaged in commerce" in Section 7 of the Clayton Act is consistent with both the history and purpose of the statute.

B. THE HISTORY AND PURPOSE OF THE CLAYTON ACT NECESSITATE A BROAD CONSTRUCTION OF SECTION 7'S COMMERCE REQUIREMENT

As the official title of the Clayton Act ("An Act To supplement existing laws against unlawful restraints and monopolies * * *," 38 Stat. 730) implies, Congress intended to extend the proscription of the anti-trust laws to transactions and trade practices not covered by the Sherman Act. The Senate Report declared that the objective of the Act was (S. Rep. No. 698, 63d Cong., 2d Sess., p. 1):

> * * * to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the [Sherman Act], or other existing antitrust acts, and thus,

> by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation * * *.

See, *e.g.*, *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 355–356; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 318 n. 32.

Section 7 was enacted in response to the great merger movement which began at the end of the nineteenth century. See H. Rep. No. 1191, 81st Cong., 1st Sess., p. 8. Decisions by this Court in *Standard Oil Co.* v. *United States*, 221 U.S. 1, and *United States* v. *American Tobacco Co.*, 221 U.S. 106, were perceived widely, if incorrectly, as emasculating the Sherman Act. See Levy, *The Clayton Law—An Imperfect Supplement to the Sherman Law*, 3 Va. L. Rev. 411, 414–415 (1916). Section 7 of the Clayton Act was designed to supplement the Sherman Act and arrest the creation of trusts or monopolies in their incipiency.

The House Committee Report states that Section 8 of the House Bill, which became Section 7 of the Clayton Act, was intended to eliminate the evil resulting from the aggregation of economic power through stock acquisitions "so far as it is possible to do so." H. Rep. No. 627, 63d Cong., 2d Sess., p. 17.

This Court discussed the purposes of Section 7 as it read prior to the 1950 amendments in *United States* v. *E. I. DuPont De Nemours & Co.*, 353 U.S. 586, and observed (353 U.S. at 589):

> Section 7 is designed to arrest in its incipiency not only the substantial lessening of com-

> petition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended.

The Clayton Act was a remedial statute designed to reach anticompetitive practices in their incipiency. It would have been anomalous for Congress to have sought to strengthen the antitrust laws by curing perceived deficiencies in the Sherman Act and at the same time to have restricted the jurisdictional scope of those remedial provisions. The Court of Appeals for the Third Circuit recognized this fact, in *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163, certiorari denied, 346 U.S. 901, in holding that banking constituted "commerce" for purposes of the Clayton Act. Thus, the court stated (206 F. 2d at 166):

> We find nothing in the legislative history, however, to indicate that Congress did not intend by Section 7 to exercise its power under the commerce clause of the Constitution to the fullest extent. The avowed purpose of the Clayton Act was to supplement the Sherman Act, 15 U.S.C.A. §§ 1–7, 15 note, by arresting in their incipiency those acts and practices which might ripen into a violation of the latter act. Since

> the general language of the Sherman Act was designed by Congress "to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements" the supplementary general language of the Clayton Act was undoubtedly intended to have the same all inclusive scope.

This conclusion is further supported by the 1950 amendments to the Clayton Act, which extended Section 7 to cover the acquisition of assets. Although the legislative history of the 1950 amendments did not deal directly with the "commerce" requirement, that history reflects a continuing Congressional intent fully to exercise its regulatory powers.

In *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 315–323, this Court reviewed the 1950 legislative history and found that "[t]he dominant theme pervading congressional consideration * * * was a fear of what was considered to be a rising tide of economic concentration in the American economy." *Id.* at 315. In addition, the legislative history reflected congressional concern over the "desirability of retaining 'local control' over industry and the protection of small businesses." *Id.* at 315–316. Motivated by its concerns over increasing concentration, Congress sought to give "* * * courts the power to brake this force at its outset and before it gathered momentum." *Id.* at 317–318.

Acquisition of firms engaged in local activities may violate Section 7 if the effect of their acquisition may be substantially to lessen competition in relevant geographic and product markets. For example, a firm

such as American Building could obtain a virtual monopoly of a service industry, with significant interstate consequences, by acquiring one local firm after another across the country. Such a result would be contrary to the aim of Section 7, which was intended to block all acquisitions likely to contribute to increasing levels of concentration. As the House Report to the 1950 amendment stated:

> Acquisitions * * * have a cumulative effect, and control of the market * * * may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition * * *. [H. Rep. No. 1191, 81st Cong., 1st Sess., p. 8.]

C. THE LANGUAGE AND LEGISLATIVE HISTORY OF THE CLAYTON ACT ARE CONSISTENT WITH A BROAD CONSTRUCTION OF SECTION 7'S COMMERCE REQUIREMENT

The applicable provisions of the Clayton Act must be read in light of the legislative purpose discussed at pp. 14–18, *supra*. As we have shown, the Clayton Act was a remedial statute and it would be anomalous to hold that its jurisdictional scope is more restricted than the Sherman Act which it was designed to supplement. The language and legislative history of the Clayton Act are consistent with that conclusion.

1. Section 7 of the Clayton Act prohibits mergers or acquisitions which may have anticompetitive effects where both the acquired and acquiring firms are

"engaged in commerce". The meaning of the phrase "engaged in commerce" is primarily derived from the definition of "commerce" in the Clayton Act and its legislative history.

Section 1 of the Clayton Act defines "commerce" as follows:

> "Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States.

This definition, which appeared in the original bill reported by the House Judiciary Committee in 1914,[8] used almost the precise words—"trade or commerce among the several States and with foreign nations"—which had been used in the Sherman Act.[9] It also

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[8] The Senate added a proviso, "That nothing in this Act contained shall apply to the Philippine Islands." S. Rep. No. 698, 63d Cong., 2d Sess., pp. 42–43. The definition section as amended has remained intact as 15 U.S.C. 12.

[9] Section 1 of the Sherman Act, 15 U.S.C. 1, declares that every contract, combination or conspiracy "in restraint of trade or commerce among the several States, or with foreign nations" is illegal, and Section 2, 15 U.S.C. 2, declares that persons who monopolize "any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

broadened the definition to encompass commerce between insular possessions and territories. The legislative history of the Clayton Act confirms that by this broad definition of "commerce" Congress intended that the Clayton Act would reach all commerce to which the Sherman Act was applicable. See pp. 30–31, *infra*.

Indeed, the House Committee Report reveals that the authors of the Clayton Act believed that they had provided broader commerce coverage than that provided in the Sherman Act. This Report says (H. Rep. No. 627, 63d Cong., 2d Sess., p. 7):

> The definition of commerce, it will be observed, is broadened so as to include trade and commerce between any insular possessions or other places under the jurisdiction of the United States, which at present do not come within the scope of the Sherman antitrust law or other laws relating to trusts.

Since Congress wanted to describe all the commerce covered by the Sherman Act, plus some that might not be, the word "commerce" should be interpreted in accordance with that stated purpose. The word "commerce" in every Clayton Act provision should be read to include all commerce covered by the Sherman Act unless the language or history of a particular Clayton Act provision demonstrates that the word was used to describe something else.

2. This Court has concluded that the commerce coverage of the Sherman Act is coextensive with all commerce subject to federal regulation under the Con-

stitution. In *Atlantic Cleaners & Dyers* v. *United States, supra,* this Court observed (286 U.S. at 435):

> A consideration of the history of the period immediately preceding and accompanying the passage of the Sherman Act and of the mischief to be remedied, as well as the general trend of debate in both houses, sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations, and conspiracies in restraint of trade, and to that end to exercise all the power it possessed.

In *United States* v. *South-Eastern Underwriters Assn., supra,* 322 U.S. at 558, this Court again concluded that the Congress which enacted the Sherman Act "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements * * *." The Court has accordingly interpreted the Sherman Act to give effect to that Congressional purpose. In *United States* v. *Frankfort Distilleries,* 324 U.S. 293, 298, the Court said that "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.' *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 495."

Consistent with this approach, the Sherman Act has been applied broadly to local activities which substantially affect interstate commerce. See *e.g., Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219 (agreement to fix price paid for California-grown sugar beets); *United States v. Em-*

ploying Plasterers Assn., 347 U.S. 186 (combination to suppress competition among Chicago plastering contractors); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (local advertising agreements used to injure competitor in interstate competition). As this Court stated in *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 464:

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.[10]

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[10] *United States* v. *Yellow Cab Co.*, 332 U.S. 218, did not limit the Sherman Act to purely interstate activities. In that case this Court held that while a conspiracy among taxi cab companies to control the transportation of passengers between railroad stations in Chicago was within the reach of the Sherman Act (332 U.S. at 229), transportation of passengers to and from the stations to homes, offices, and hotels had only a "casual and incidental" relationship to interstate commerce (332 U.S. at 230–232). The Court noted that a traveler has complete freedom to arrange his transportation by several means of conveyance, of which taxi cab service is only one. The Court cautioned, however, that it was not "establish[ing] any absolute rule that local taxicab service to and from railroad stations is completely beyond the reach of federal power or even beyond the scope of the Sherman Act. * * * All that we hold here is that when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation" (332 U.S. at 232–233).

The phrase "engaged in commerce" in Section 7 should accordingly be interpreted to mean engaged in activities which are subject to the federal Commerce power. A more restrictive interpretation, confining the statute to activities within the flow of interstate commerce, would partially defeat the Clayton Act's central purpose of halting incipient anticompetitive transactions before they develop into restraints and monopolies prohibited by the Sherman Act.

D. THIS COURT'S DECISIONS CONSTRUING THE COMMERCE REQUIREMENTS OF THE ROBINSON-PATMAN ACT AND THE FEDERAL TRADE COMMISSION ACT ARE NOT CONTROLLING HERE

1. The Robinson-Patman Act

The factors which led the Court to conclude in *Copp* that Section 2(a) of the Robinson-Patman Act does not reach all discriminatory sales which are subject to the Commerce Power are not applicable to Section 7 of the Clayton Act. Although the Clayton Act commerce definition is applicable to Section 2 of the Robinson-Patman Act, which replaced the original Section 2 of the Clayton Act, the Court's decision with respect to the commerce reach of Section 2(a) was based upon language and history which is peculiar to that provision.

Section 2 of the original Clayton Act prohibited certain discriminatory commodity sales in the course of "commerce" by sellers who are "engaged in commerce." A third commerce requirement was added by

the 1936 amendments which limited the application of the revised provision to transactions "where either or any of the purchases involved in such discrimination are in commerce * * *" (49 Stat. 1526). A long series of courts of appeals' decisions interpreted that 1936 language to mean that "at least one of the two transactions which, when compared, generate a discrimination * * * cross a state line" (slip op. 13–14). This Court concluded that it is logical to interpret "purchases * * * in commerce" in that context to mean an interstate sale.

Moreover, this Court did not rely exclusively upon the language of Section 2(a) and precedent construing it. The Court also found that the 1936 Congress had considered and rejected other language which would have made Section 2(a) applicable to discriminatory sales by "any person, *whether in commerce or not*" and concluded that this Congressional action "strongly militates against a judgment that Congress intended a result that it expressly declined to enact" (slip op. 13).

There is no comparable evidence of a conscious Congressional decision to reject arguably broader commerce language with respect to Section 7. The "engaged in commerce" language was part of the original bill proposed by the House Judiciary Committee under the leadership of Congressman Clayton. The 1914 Congress never considered adopting different language such as "corporations engaged in or affecting commerce." In 1950, Congress did not con-

sider changing the wording of the commerce requirement when it amended Section 7.[11]

2. The Federal Trade Commission Act

Appellee claims that this Court should conclude that the words "in commerce" necessarily mean in the flow of interstate commerce because the Court concluded in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349, that the words "in commerce" in Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, mean in the flow of interstate commerce.

The *Bunte Bros.* decision was based on two grounds: (1) a restrictive principle of statutory construction derived from an examination of the commerce provisions in legislation enacted between 1935 and 1940, and (2) the Commission's own restrictive construction of the Act, reflected in its unsuccessful attempt in 1935 to obtain legislation extending the Act to local activities affecting commerce. Neither rationale may properly be applied to the Clayton Act.

A. The principle of statutory construction adopted in *Bunte Bros.* is of doubtful validity in light of this Court's subsequent decision in *South-Eastern Underwriters, supra.* The principle was based upon and reflected a method of legislative drafting which embodied contemporaneous judicial decisions re-

[11] It should be noted that the Section 7 commerce language unlike the Robinson-Patman Act third test does not have a long history of judicial interpretation. The *Transamerica* opinion is the only previous opinion which has addressed the question presented in this case.

strictively construing the reach of the commerce clause. It assumes that the Congress which wrote the Clayton Act in 1914 intended to freeze the reach of that Act "within the mold of then current judicial decisions defining the commerce power." *South-Eastern Underwriters, supra,* 322 U.S. at 557. This proposition was rejected in *South-Eastern Underwriters* with respect to the 1890 Congress which adopted the Sherman Act. It must also be rejected as applied to the 1914 Congress which passed the Clayton Act—a statute that was intended to broaden the earlier legislation.

In *Bunte Bros.,* this Court stated (312 U.S. at 351):

> When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. See for example, National Labor Relations Act, §§ 2(7), 9(c), 10(a), 49 Stat. 450, 453, 29 U.S.C. §§ 152 (7), 159(c), 160(a); Bituminous Coal Act, § 4–A, 50 Stat. 83, 15 U.S.C. [1940 ed.] § 834; Federal Employers' Liability Act, § 11, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U.S.C. § 51.

But, as the dissent in *Bunte Bros.* recognized, *id.,* at 358, the three statutes cited by the majority as examples were enacted over 20 years after the Federal Trade Commission Act became law. These statutes, moreover, were enacted after *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, decided in 1935, which drew a sharp distinction between "flow of commerce" and "affecting commerce" jurisdiction.

"The meaning of each [statutory] phrase must be closely related to the time and circumstance of its use." *United States* v. *Stewart,* 311 U.S. 60, 69. Subsequent "statutes dealing with other fields * * * are of little aid in interpreting an earlier act in its own legislative setting." *Federal Trade Commission* v. *Bunte Bros., supra,* 312 U.S. at 358 (dissenting opinion).

Judicial decisions of the 1914 era do not draw a sharp distinction between activities in the flow of interstate commerce and local activities which affect that commerce. Judges of that period tended to equate "commerce among the States" with all commerce which is subject to federal regulation.

In *Gibbons* v. *Ogden,* 9 Wheat. 1, 194, Chief Justice Marshall commented: "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one." The commerce "which concerns more States than one" includes all commerce within a state which affects interstate commerce.

Two years before the enactment of the Clayton Act, in the *Second Employers' Liability Cases,* 223 U.S. 1, 46–47, this Court said:

> The phrase "among the several States" marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally.

The following year, this Court observed in the *Minnesota Rate Cases*, 230 U.S. 352, 398:

> The words "among the several States" distinguish between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States.

The draftsmen of the Clayton Act were presumably aware of those decisions. Using the phrase "among the several States" in the Clayton Act's definition of "commerce", they must have assumed, would claim the full sweep of Congressional power to regulate commerce.

Therefore, the *Bunte Bros.* decision is erroneous to the extent that it is based on the assumption that Congress has always employed words such as "affecting commerce" when it wished to cover both activities in the flow of interstate commerce and intrastate commerce which affects the flow of interstate commerce.[12] That assumption fails to take account of the fact that styles of draftsmanship change over time.

The majority opinion in *Copp* suggests another reason for concluding that the 1914 Congress may have meant "engaged in the flow of interstate commerce" when it used the words "engaged in commerce." That opinion observed (slip op. 15): "When these sec-

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[12] Congress subsequently revised Section 5 of the Federal Trade Commission Act to insert "in or affecting commerce" in lieu of "in commerce." See Section 201(a) of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. 93-637, 88 Stat. 2183, 2193.

tions were originally enacted, it was thought that Congress' Commerce Clause power reached only those subjects within the flow of commerce, then defined rather narrowly by the Court."

But our discussion of the judicial opinions preceding passage of the Act and the Congressional debates concerning the Clayton bill (see pp. 27–28, *supra*; pp. 30–31, *infra*) demonstrates that neither the courts nor a majority of the members of Congress equated the Commerce Clause power with the flow of commerce. As previously noted, this Court's opinions in the *Second Employers' Liability Cases* and the *Minnesota Rate Cases* stated that Congress had power to regulate all commerce except that commerce which is confined within one state *and* does not affect other states. That definition of the Commerce Power does not exclude intrastate commerce which does affect other states.

This Court issued an opinion in the midst of the congressional debate on the Clayton Act which did focus directly upon the question of federal power to regulate local activities affecting interstate commerce. In the *Shreveport Rate Cases*, 234 U.S. 342, this Court held that the Interstate Commerce Commission may regulate intrastate railroad rates which affect interstate commerce. Although that decision did not finally determine the precise scope of congressional power to regulate intrastate commercial activities, it at least established that congressional power to regulate commerce among the several states includes power to regulate some activities which are not part of the "flow of

commerce." [13] Thus, at the time the Clayton Act was enacted, this Court did not confine Congress' Commerce Clause power to only those subjects within the "flow of commerce."

The Clayton Act debates do not reveal any consensus with respect to the precise scope of the Commerce Power. A majority of the members did not participate in this aspect of the debates. Many members did express opinions on that subject, but their views were widely divergent. See, *e.g.*, 51 Cong. Rec. 14035–14042. Some believed that Congress had no power to regulate intrastate transactions. See, *e.g.*, 51 Cong. Rec. 9411 (remarks of Rep. Towner), 51 Cong. Rec. 16115 (remarks of Sen. Walsh). Some believed that Congress did have power to regulate some intrastate sales. See, *e.g.*, 51 Cong. Rec. 9159 (remarks of Rep. Floyd). Still others described the Commerce Power in terms which are as expansive as any of the subsequent decisions of the Court. For example, Senator Reed declared (51 Cong. Rec. 14458):

> I hold to the view that the right of Congress to regulate interstate commerce carries with it the power to do all that is necessary to protect that interstate commerce and see that it flows freely and openly and without obstruction, and that therefore Congress has the power within its discretion to condemn certain acts which are in the nature of consolidations, the reasonable

[13] There is no suggestion in the *Shreveport Rate Cases* or any other decision of the time that particular statutory language was necessary to claim that power.

> effect of which may be to restrain trade, and that if Congress exercises that power it will not, in my humble judgment, be disturbed by the court.

We submit that while it is not possible to reconstruct a majority consensus with respect to the precise limits of the Commerce Power, the legislative history does provide clear evidence that a majority of the 1914 Congress did not equate the Commerce Power with the flow of interstate commerce.

Notwithstanding the absence of a consensus concerning the precise scope of the commerce power, the choice of language in the Section 1 definition of "commerce" indicates that the 1914 Congress intended to exercise all the power it had. The draftsman did not use words such as "affecting commerce," "the flow of commerce," "interstate commerce," or "intrastate commerce." They used the words trade or "Commerce * * * among the several States * * *." These are the precise words used in Article I, Section 8, clause 3 of the Constitution to describe the scope of Congressional power to regulate domestic commerce. A draftsman who wanted to describe all commerce which is subject to federal jurisdiction would reasonably assume that using the precise words of the Constitution would accomplish that purpose.[14]

[14] The contemporaneous history of the Federal Trade Commission Act provides further evidence that the 1914 Congress equated the commerce described in Section 1 of the Clayton Act with that commerce which Congress has power to regulate. The two bills were considered at the same time. The Federal Trade Commission Act was finally enacted on September 26, 1914, and

B. The second ground underlying *Bunte Bros.*—the agency's own restrictive interpretation of the statute and its unsuccessful legislative attempt to

the Clayton Act was enacted on October 15, 1914. Both the House and Senate versions of the Trade Commission Bill defined "commerce" as "such commerce as Congress has the power to regulate under the Constitution." H. Rep. No. 1142, 63d Cong., 2d Sess., pp. 11, 13. The Conference Committee changed the definition to "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation." *Id.* at 2–3. The Conference Report did not explain the change apart from a general observation that "[t]he definitions respecting 'commerce,' etc., remain substantially as in section 4 of the House bill." *Id.* at 18.

During the course of the debates on the Conference Report Congressmen Covington and Stevens acknowledged that the revised definition excludes commerce with possessions such as Puerto Rico, Guam, the Canal Zone and the Philippine Islands. 51 Cong. Rec. 14927, 14935. Congressman Stevens stated that foreign possessions were excluded because "conditions there are so different than here that they could be handled by local authorities better than by a commission 7,000 miles away in the city of Washington." *Id.* at 14935.

No one suggested that the change in language reduced the scope of the Commission's authority with respect to any commerce other than commerce with and within foreign possessions. Therefore, they must have assumed that the words "commerce among the several States" described all of the commerce "Congress has power to regulate under the Constitution," except foreign commerce and commerce with and within territories, possessions, and the District of Columbia.

The *Bunte Bros.* opinion did not discuss this legislative history. We are not suggesting, however, that *Bunte Bros.* should be overruled. As shown in the text (pp. 32–33, *supra*), *Bunte Bros.* was not based solely on the absence of "affecting commerce" language in the Federal Trade Commission Act, and in any event, the statutory interpretation question in *Bunte Bros.* is now moot. See Pub. L. 93–637, 88 Stat. 2183, 2193; n. 12, *supra*.

broaden the Act—is inapplicable to the Clayton Act. Neither the Department of Justice nor the Federal Trade Commission has interpreted the Clayton Act as inapplicable to local transactions affecting commerce, and neither has sought amendatory or clarifying legislation dealing with the problem.[15] The 1950 amendments, which dealt only with Section 7, did not focus on the commerce definition. Thus, those amendments cannot be read as reflecting a congressional intent that Section 7 be limited to interstate transactions.

Indeed, although the legislative history of the 1950 amendments contains no reference to the "engaged in commerce" phrase of Section 7, the discussion of the "any section of the country" language of that section is inconsistent with any suggestion that Congress

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[15] In any event, this Court's decision in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, casts considerable doubt on the continued validity of these factors in statutory construction. There this Court, in holding Section 7 of the Clayton Act applicable to bank mergers, rejected the argument that the passage of the Bank Merger Act of 1960 and enforcement policies of the Justice Department indicated that Section 7 did not reach bank mergers. With respect to the passage of the Bank Merger Act, this Court observed that (374 U.S. at 348–349) "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." Although the Justice Department had at one time held the view that Section 7 did not reach bank mergers, this Court found that view to be a misunderstanding of the scope of Section 7, and as such not binding on the Court (374 U.S. at 349). See also *United States* v. *DuPont Co.*, 353 U.S. 586, where this Court rejected the Federal Trade Commission's view that Section 7 of the Clayton Act did not apply to vertical acquisitions.

intended to confine Section 7 to the flow of interstate commerce. The Senate Report observed (S. Rep. No. 1775, 81st Cong., 2d Sess., p. 4):

> As the bill originally stood it was to be violated if, among other things, competition was substantially lessened "* * * in any community * * *" of the country. The use of this word raised a storm of controversy, centering around the possibility that the act, so worded, might go so far as to prevent any local enterprise in a small town from buying up another local enterprise in the same town. As a consequence, the word "community" was dropped from the subsequent versions of the bill.

Implicit in this analysis is the assumption that as originally drafted the bill covered such local mergers. If Congress had thought that the "engaged in commerce" language excluded mergers of local firms, there would have been no need to adopt the "section of the country" language in order to exclude mergers of minor impact. Therefore, to the extent that the 1950 Congress considered the "engaged in commerce" language, it must have assumed that it covered firms engaged in local activities which substantially affect interstate commerce. Any other assumption would have conflicted with the basic purposes of the 1950 amendments, which were designed to make Section 7 a more effective instrument for preventing anticompetitive mergers.

Finally, even assuming the validity of the explicit language principle of construction, *Bunte Bros.* recognizes that it is not an absolute requirement and that

it should not be followed where "* * * the purpose of the Act would be defeated." 312 U.S. at 351. A restrictive interpretation of the Clayton Act "commerce" requirement would, as shown earlier (pp. 17–18, *supra*), frustrate the statutory purposes of the Act. Moreover, unlike Section 5 of the Federal Trade Commission Act, Section 7 of the Clayton Act embodies a "relatively precise" (312 U.S. at 353) prohibition and its enforcement is qualified by the requirement that the effect of transactions encompassed by that section "may be to substantially lessen competition, or to tend to create a monopoly." Thus, the application of Section 7 to local transactions substantially affecting commerce would not give a "* * * federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local laws" (*id.* at 354).

In *Gulf Oil Corp.* v. *Copp Paving, Inc., supra,* this Court recognized that our submission concerning the proper construction of the commerce requirement of the Clayton Act "is neither without force nor at least a measure of support" (slip op. 15). But the Court expressed doubt whether it would justify "radical expansion of the Clayton Act's scope beyond that which the statutory language defines * * *" (*ibid.*). As we have shown, however, if the language of the Act is read in the proper historical and linguistic context, it defines "commerce" as any commerce affecting more states than one.

Moreover, as we have pointed out, the Clayton Act, unlike the Federal Trade Commission Act, was never

accorded a restrictive construction by those charged with its enforcement. It is true that previous Section 7 cases have involved both acquiring and acquired firms engaged in the flow of commerce. But that past enforcement pattern simply reflects the fact that the government has devoted its limited enforcement resources to areas where the need was most pressing. The rapid growth of the service sector of the national economy is of relatively recent origin and this case is a response to what the record shows is an increasing trend toward concentration in that sector. This case does not represent an attempt to effect a "radical expansion" of the scope of the Clayton Act, but is simply an application of the statute that is warranted by changing economic conditions.

The history and purpose of the Clayton Act as a whole, and Section 7 in particular, demonstrate that "engaged in commerce" means engaged in activities subject to federal commerce power, *i.e.*, activities in the flow of commerce as well as local activities that substantially affect interstate commerce. The government satisfied the commerce requirement in this case by establishing that the Benton companies were engaged in such activities at the time of the merger and acquisition.

II. THE BENTON COMPANIES WERE "ENGAGED IN COMMERCE" FOR PURPOSES OF SECTION 7 OF THE CLAYTON ACT

For the reasons set forth earlier, we submit that Section 7 of the Clayton Act, like the Sherman Act, applies to intrastate activities that substan-

tially affect interstate commerce. In our view, it is unnecessary to determine whether Benton's activities were in the flow of commerce. "[T]he vital question becomes whether the effect [of the activities on interstate commerce] is sufficiently substantial * * *" (*Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co., supra,* 334 U.S. at 234) and "it is enough if some appreciable part of interstate commerce" is involved. *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 225.

The record in this case shows that the Benton companies engaged in activities that affect appreciable parts of interstate commerce. But even if it is assumed, contrary to our submission, that Section 7 is confined to firms engaged in the flow of commerce, the Benton companies' activities placed them in the flow of commerce.

1. The record establishes that the Benton companies' activities affected an appreciable part of interstate commerce.[16] The services that Benton performed for its customers had a significant effect upon the flow of commerce. Benton derived 80 to 90 percent of its revenues from customers who are engaged in selling goods in interstate and foreign commerce or in providing interstate communications (App. 146). It pro-

[16] This case thus differs from *Gulf Oil Corp.* v. *Copp Paving Co., Inc., supra,* where no evidence of effect on commerce was offered (slip op. 16). In *Copp,* the plaintiff relied solely on the fact that work was performed on interstate highways. This court held that such a purely formal nexus to interstate commerce was insufficient to satisfy the commerce requirement of the Clayton Act (*ibid.*).

vided essential services for many of the country's leading corporations including Mobil Oil, Texaco, Union Oil, Rockwell International, TRW, and Carnation. The price and quality of the janitorial services those companies purchase necessarily have an impact on their operations. Indeed, we submit that the character of these services placed Benton in the flow of commerce (see pp. 39–43, *infra*).

In order to provide services to its customers, Benton paid more than $150,000 per year to purchase or lease goods manufactured in other states (App. 145). Purchases of goods originating in other states have frequently been recognized in Sherman Act cases as sufficient to establish the requisite effect upon interstate commerce. See, *e.g.*, *Burke* v. *Ford*, 389 U.S. 320; *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186. Benton's purchases represent a substantial amount of interstate commerce. In *Katzenbach* v. *McClung*, 379 U.S. 294, this Court upheld the application of the Civil Rights Act of 1964 to a restaurant which purchased $70,000 worth of meat per year which had originated in other states. All of the restaurant's meat purchases were made through a local supplier. The Court concluded in *Fortner Enterprises* v. *U.S. Steel*, 394 U.S. 495, that a tying arrangement involving annual sales of $190,000 represented a substantial volume of commerce in the tied product. The Court said: "[W]e cannot agree with respondents that a sum of almost $200,000 is paltry or 'insubstantial.'" *Id.* at 502.

2. Assuming Section 7 requires a showing that an acquired company is engaged in the flow of commerce, the Benton companies' activities satisfy that standard.

The "flow of commerce" concept was developed in cases involving tangible commodities such as poultry, livestock, and grain for purposes of ascertaining when interstate commerce begins and ends. The actual performance of services is unlikely to involve a movement across state lines even though the services may be intimately related to interstate commerce. This Court's opinion in *Gulf Oil Corp.* v. *Copp Paving Co., Inc., supra,* implicitly recognizes that a mechanical formulation of "flow of commerce" is unsound. Thus, this Court described (slip op. 8) "flow of interstate commerce" as "the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." This Court's formulation encompasses, we submit, firms, such as the Benton companies, that perform a substantial amount of services for enterprises which are themselves engaged in interstate and international sales of tangible commodities and interstate communications.

Benton's involvement in the operations of its clients was more direct and significant than that of a supplier of goods. Companies such as TRW (App. 54–58) and Rockwell (App. 62–70) in effect "contracted

out" to Benton part of their operations performed on their premises and vital to their interstate operations.[17] Thus, Benton was directly engaged in the operations of interstate and international enterprises. Benton's services were an essential and important part of those operations.[18]

This Court has previously determined that persons who maintain buildings in which goods are produced are covered by Fair Labor Standards Act provisions applicable to employees "engaged * * * in the * * * production of goods for commerce." In *Kirschbaum Co.* v. *Walling, supra,* 316 U.S. at 524, the Court decided that firemen, engineers, watchmen, porters, carpenters and elevator operators employed by the owner of a loft building occupied by tenants who were engaged in garment manufacture were covered. The Court reasoned: "Without light and heat and power the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity." *Ibid.*

The *Kirschbaum* rule has subsequently been extended

[17] As noted at p. 6, *supra*, Benton's aerospace customers required exceptionally high maintenance quality as an integral part of production operations.

[18] See Affidavits of Charles V. Engle (TRW) (App. 54–58); Raymond Hernandez (Jet Propulsion Laboratory) (App. 59–61); Charles W. Moxley and John Blain (Rockwell) (App. 62–70); Donald E. Del Dosso (General Telephone) (App. 75–76); George G. Guest (Pacific Telephone) (App. 77–78); John Stover (Mobil) (App. 79–81); L. B. Higbee (Union Oil) (App. 82–83); Edward H. Patotzka (Texaco) (App. 84–85); Maynard Heider (Carnation) (App. 86–88); and Edmund Sakowicz (Teledyne) (App. 89–90). See also Affidavit of Dr. Philip Neff, the government's expert (App. 127, 133–137).

to maintenance workers at Borden Co.'s corporate headquarters (*Bordon Co.* v. *Borella,* 325 U.S. 679) and window washers employed by an independent contractor who supplies such services to manufacturing plants (*Martino* v. *Michigan Window Cleaning Co.,* 327 U.S. 173).

Similarly, in the present case, Benton's janitorial services were so essential to and intimately connected with the operations of its customers as to be "an inseparable part of the flow of the interstate commerce involved." *Lorain Journal Co.* v. *United States, supra,* 342 U.S. at 152.

The conduct of Benton's business also involves other forms of interstate activity which can be appropriately viewed as engaging in the flow of commerce. In *United States* v. *International Boxing Club, Inc.,* 348 U.S. 236, this Court rejected claims that boxing cannot be interstate commerce because all the blows are struck within a particular state. The Court said: "A boxing match—like the showing of a motion picture * * * or the performance of a vaudeville act * * * or the performance of a legitimate stage attraction * * *—'is of course a local affair.' But that fact alone does not bar application of the Sherman Act to a business based on the promotion of such matches * * *" (*Id.* at 241; citations omitted). The Court explained that the "controlling consideration * * * [is] a very practical one—the degree of interstate activity involved in the particular business under review." *Id.* at 243.[19] The

[19] See *Swift and Company* v. *United States,* 196 U.S. 375, 398: "[C]ommerce among the States is *not* a technical legal conception, but a practical one, drawn from the course of business." (Emphasis added.)

interstate activities involved in the promotion of boxing matches included the negotiations of contracts "with boxers, advertising agencies, seconds, referees, judges, announcers, and other personnel living in states other than the state in which the promoters reside" (*id.* at 238); leasing arenas in states other than the promoter's residence, selling tickets across state lines, etc. (*id.* at 239).

The sale of building maintenance and building management services can involve similar interstate activity even if all of the services are performed in connection with buildings located within a single state. Many buildings in the Los Angeles area are owned by individuals who reside elsewhere or by corporations headquartered elsewhere. Therefore, the sale of the janitorial and property management services provided by Benton necessarily involves interstate communications, solicitations and negotiations (see App. 72). Such interstate activity should be viewed as part of the flow of interstate commerce.

In *United States* v. *South-Eastern Underwriters Assn., supra,* 322 U.S. at 541, this Court found a fire insurance company engaged in "commerce among the several States," noting:

> Premiums collected from policyholders in every part of the United States flow into these companies [located, for the most part, in the financial centers of the East] for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and

> indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts.

Appellee contends that Benton's participation in such a "stream of intercourse among the states" is too insubstantial to place it "in" the flow of commerce. Appellee asserts that this is the case because the cost of Benton's interstate telephone calls during the eighteen months preceding the acquisition was $19.78 and the cost of 203 interstate mail items during that period was $22.33 (Motion to Affirm, p. 18). Appellee also states that "only a few of [the interstate mail items] * * * related to the solicitation or negotiation of contracts." *Ibid.*

The significance of interstate solicitations and interstate negotiations cannot be measured by the cost of the interstate communications. The value of the contracts which Benton sought or obtained represent a more meaningful measure of the substantiality of this interstate activity. The Tishman Plaza and the New York Life Insurance contracts, which were the product of negotiations with company executives based outside California, made a significant contribution to Benton's total revenues.[20]

[20] The data with respect to these contracts are contained in exhibits covered by the district court's protective order of June 2, 1971. The Tishman Plaza contract was executed by Tishman executives based in New York (Aff. of Alan D. Levy, App. 72). Benton personnel conducted extensive correspondence with New York Life personnel in New York in connection with the New York Life contract (Aff. of John D. Gaffey, App. 147–160).

Thus, Benton was "engaged in commerce" even if that phrase is interpreted to mean engaged in the flow of commerce rather than engaged in activities affecting interstate commerce.

CONCLUSION

The summary judgment of dismissal by the district court should be reversed and the case should be remanded for a trial on the merits.

Respectfully submitted.

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